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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. _____

CPC INTERNATIONAL INC., ET AL.,

Petitioners,

v.

RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

Petitioners CPC International Inc., *et al.*,[1] ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on August 18, 1976.

Opinions Below

The opinion of the court of appeals is reported at 540 F.2d 1329. The opinion and the judgment of the court are annexed hereto as Appendix A.

The decision of the court of appeals was the second decision by the court in a continuing proceeding over which the court had and has retained jurisdiction. In the first decision, reported at 515 F.2d 1032, the court of appeals ruled that the new source standards issued by the Environmental Protection Agency for the corn wet milling industry were invalid, and the court remanded the standards to the

[1] Petitioners are CPC International Inc. and the Corn Refiners Association, Inc. Respondents are Russell E. Train, Administrator, Environmental Protection Agency, and John Quarles, Deputy Administrator, Environmental Protection Agency.

Agency for further administrative proceedings. The second decision, the subject of this petition, reflects the court's review of the Administrator's decision made in the proceedings on remand from the court's first decision.

Jurisdiction

The judgment of the court of appeals here sought to be reviewed was entered on August 18, 1976. On November 8, 1976, Mr. Justice Blackmun, acting in his capacity as Circuit Justice for the Eighth Circuit, issued an order extending the time in which to file a petition for certiorari in this case to and including January 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether standards of performance promulgated under Section 306 of the Act to control effluent discharges from sources constructed after the publication of proposed standards ("new sources") are "presumptively applicable" to, rather than always binding on, such sources, such that the Agency must provide a "safety valve procedure" enabling an individual new source to obtain a discharge permit different from the standards upon a proper factual showing.[2]

2. Whether under the Act the Agency must provide in its new source standards for the statistically expected "excursions" from the effluent levels specified in the standards.

3. Whether the Agency's new source standards for the corn wet milling industry are arbitrary and capricious in ignoring product-mix variations and in failing to make any provision for the different effluents resulting from manufacture of disparate and diverse products at corn wet mills.

Statutes, Regulations, And Regulatory Orders Involved

1. *The Federal Water Pollution Control Act, as amended.* Sections 306 and 402 of the Act (33 U.S.C. §§ 1316 and 1342) are set forth in Appendix B, *infra*.

[2] This question is presently before the Court in *E. I. du Pont de Nemours & Co.* v. *Train*, Nos. 75-978, 75-1473, and 75-1705.

2. *"New Source Standards" for the Corn Wet Milling Subcategory of the Grain Mills Point Source Category.* The regulations initially issued by the Administrator under Section 306 which constitute standards of performance for new sources in the corn wet milling industry are found at 40 C.F.R. § 406.15, *added by* 39 *Fed. Reg.* 10512-10515 (March 20, 1974). These regulations and portions of the rulemaking order by which they were promulgated are set forth in Appendix C, *infra*.

3. *The Administrator's "Decision Not To Revise New Sources Performance Standards".* After the court of appeals in its first decision in this case had ruled that the Agency's new source standards were invalid and had remanded them for further administrative proceedings, the Agency requested further submissions and comments on its standards and engaged a contractor to reevaluate the effluent results obtainable at new plants in the industry. Based upon the initial administrative record and upon additional information compiled on the remand, the Administrator issued a "Decision Not To Revise New Sources Performance Standards". That decision was published in the *Federal Register* at 40 *Fed. Reg.* 52016-52019 (November 7, 1975). Excerpts from the decision are set forth in Appendix D, *infra*.

4. *The Agency's recent amendment to the new source standards.* The Agency has recently amended its regulations. The rulemaking order making the amendment is found at 41 *Fed. Reg.* 50823 (November 18, 1976); portions of this order are set forth in Appendix E, *infra*. The amendment constitutes the Agency's action to comply with the decision and remand of the court of appeals at issue in this petition.

STATEMENT OF THE CASE

The Federal Water Pollution Control Act Amendments of 1972 restructured the federal government's program for water pollution control. Among other things, the 1972

Amendments added to the Federal Water Pollution Control Act ("the Act") a new provision, Section 306, 33 U.S.C. § 1316, which requires the Administrator to issue in the form of regulations "Federal standards of performance for new sources". (§ 306(b)(1)(B).) These standards for the control of the discharge of pollutants are to reflect "application of the best available demonstrated control technology" to sources the construction of which is commenced after publication of proposed regulations prescribing the standards.[3] (§ 306(a)(1).) Section 306(b)(1)(A) mandates that the Administrator of the Environmental Protection Agency (variously "the Administrator", "EPA" or "the Agency") must issue standards for at least 27 separate industrial categories of sources, including "grain mills".

This petition relates to EPA's new source standards for the Corn Wet Milling Subcategory of the Grain Mills Point Source Category.

1. *Initial administrative proceedings and the first decision of the court of appeals.* EPA published proposed new source standards for corn wet mills on December 4, 1973. (38 *Fed. Reg.* 33438, 33442.) At the same time, the Agency published proposed "effluent limitations guidelines" for existing plants in the industry. (*Id.*) After the Agency had received and evaluated comments on its proposed standards, final standards were issued which were slightly different from the proposal in format and in section-number designations, but which contained precisely the same numerical values for the pertinent pollutant parameters (BOD_5, TSS, and pH).[4] (39 *Fed. Reg.* 10512, 10515 (March 20, 1974).) Like the proposed standards, the final standards applied to all new sources in the industry notwithstanding the variety of end products manufactured at such plants.[5] EPA set out its asserted technical basis for the regulations in a book-like "Development Document".

[3] New sources, like existing sources, must obtain a permit to make a discharge of pollutants into waters of the United States. Section 402 of the Act, 33 U.S.C. § 1342, provides the authority and basis for issuance of permits both by EPA (§ 402(a)) and by qualified and approved State authorities (§ 402(b)-(f)). Permits for new sources are to apply the requirements of Section 306. See §§ 402(a)(1) and 402(b)(1)(A).

[4] "BOD_5" is five-day biological oxygen demand, "TSS" is total suspended solids, and "pH" refers to the logarithmic scale of values representing relative acidity or alkalinity. See *CPC International Inc.* v. *Train*, 515 F.2d 1032, 1044 nn.21-23 (8th Cir. 1975) ("*CPC I*").

The petitioners, representatives of the corn wet milling industry, filed a timely petition for review of the new source standards in the Eighth Circuit.[6] That petition was considered by the court of appeals along with two separately filed petitions to review EPA's simultaneously issued guideline regulations for existing plants.

In *CPC International Inc.* v. *Train*, 515 F.2d 1032 (8th Cir. 1975) ("*CPC I*"), the court of appeals ruled that the new source standards were invalid because the Agency had premised the standards upon a technology which had not been "demonstrated" for the industry as required by Section 306(a)(1). (*Id.*, 515 F.2d at 1047-1051.) EPA had asserted that "deep bed filtration" was a technology which had been used in some other industrial applications and at municipal treatment works, and that it could make a projection of results for the corn wet milling industry in reliance upon a "transfer" of this technology. (*Id.*, 515 F.2d at 1047-1048.) The court held that the record showed no basis for use of "transfer technology". (*Id.*, 515 F.2d at 1048-1049.) It rejected the new source standards and remanded them to the Agency.[7]

[5] The regulations applied "to discharges resulting from the process in which shelled corn is steeped in a dilute solution of sulfurous acid and then processed by wet means into such products as animal feed, regular and modified starches, corn oil, corn syrup, and dextrose." (40 C.F.R. § 406.10, *added by* 39 *Fed. Reg.* 10512, 10514 (March 20, 1974).) This specification of the coverage of EPA's standards also pertains to the Agency's "effluent limitations guidelines" applicable to existing plants in the industry.

[6] Section 509(b)(1) of the Act, 33 U.S.C. § 1369(b)(1), provides that "[r]eview of the Administrator's action (A) in promulgating any standard of performance under section 306 . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business . . . [where the petition for review is filed within 90 days]."

[7] In the same decision, the court of appeals ruled that for existing plants EPA was mandated by the Act to issue guideline regulations

2. *Further administrative proceedings and the second decision of the court of appeals.* As instructed by the court of appeals in *CPC I*, EPA conducted further administrative proceedings respecting the new source standards for corn wet mills. Representatives of the industry made numerous submissions to the Agency. Among the major issues in these further proceedings were the questions (1) whether the Agency had an obligation under the Act to provide in its standards for the statistically expected "excursions" from the effluent levels specified in the standards,[8] and (2) whether in a standard based upon quantity of raw material processed rather than products produced, the Agency

under Section 304(b), 33 U.S.C. § 1314(b), and that the Agency had no authority to promulgate "limitations" by regulation under Section 301(b) of the Act, 33 U.S.C. § 1311(b). Because the jurisdictional provisions of Section 509(b) of the Act, 33 U.S.C. § 1369(b), did not and do not provide that actions to review such guideline regulations should be brought initially in the court of appeals, the court dismissed the companion petitions for review of the simultaneously issued guideline regulations for the industry. (*Id.*, 515 F.2d at 1037-1038.)

[8] This issue arises because the numerical values in EPA's standards do not reflect long-term average performance results. Rather, for enforcement purposes, EPA set the values in the regulations on a short-term basis, *i.e.*, for each pollutant parameter, as a "[m]aximum for any 1 day" and as a maximum "[a]verage of daily values for 30 consecutive days." See 40 C.F.R. § 406.15. Thus, the long-range average performance values on which EPA based its standards had to be converted into the short-range values actually present in the regulations. This conversion is most accurately and easily provided by a statistical analysis of historical results from a plant or plants employing the requisite technology and thus providing the long-range performance values. "Variability factors" are obtained; these factors are multipliers to convert the lower long-term average values into the higher values for the particular short-range periods selected by the Agency as suitable for regulatory purposes. The statistical calculations are made such that the resulting short-term values will encompass a set percentage (*e.g.*, ordinarily 99 percent or perhaps 95 percent) of the expected results. The remaining results (*e.g.*, one percent or 5 percent, as the case may be) are denominated "excursions".

EPA stated the principle underlying such calculations, and their use in setting standards, as follows: "Variability limitations will be set such that all the mills listed as not violating the BOD and TSS annual average will also not violate the thirty day average and daily maximums." (Joint Deferred Appendix in the court of appeals, at N 3224.) Petitioners do not contest this principle, but rather petitioners have asserted and now assert that EPA has not followed it in these standards.

should take product-mix variations into account by providing in the standards for the differing effluent results obtained from the manufacture of disparate and diverse products at corn wet mills.[9] At the conclusion of the proceedings, the Administrator issued a "Decision Not To Revise New Sources Performance Standards", in which he rejected each of the positions advocated by the corn wet mills. Respecting statistically expected "excursions", the Administrator said the Agency had chosen not to rely upon the "effluent variability analysis of historical treatment data contained in the Supplemental Development Document. . . ." (40 *Fed. Reg.* at 52019.) Rather, statistical calculations were "presented in the Supplemental Development Document only as an illustration that the new source performance standard is reasonable and attainable in relation to existing overall industry practice." (*Id.*) This response avoided rather than answered the issue posed by the milling companies. As to the differing effluent results obtained by manufacture of a variety of products at the mills, the Administrator responded that

> "EPA has acknowledged, and continues to acknowledge, that product mix variations may indeed have some influence on raw waste characteristics of corn wet milling wastes. However, no reliable and meaningful relationships between product mix and waste flow characteristics has been demonstrated to date either by EPA or industry."
>
> (*Id.* at 52017-52018.)

EPA concluded that product mix differences were "interrelated in a very complex and presently undefinable manner" with other factors bearing on effluent results (*id.* at

[9] Most of EPA's industry-category regulations are written on a different basis than are these regulations. The majority of EPA's regulations are expressed in terms of pounds of allowable effluent per pounds of production of a given product. See *e.g.*, 40 C.F.R. § 415.225 (Inorganic Chemicals Category—Titanium Dioxide Production Subcategory). The regulations for corn wet mills, however, are premised upon the raw material input (shelled corn) to the mills, and not upon the variety of products manufactured from the shelled corn.

52018), and that no provision need be made in the standards for the manufacture of the different end products.

The petitioning companies returned to the court of appeals seeking review of the Agency's refusal to revise the standards. In its second ruling, *CPC International Inc.* v. *Train*, 540 F.2d 1329 (8th Cir. 1976) (*"CPC II"*), the court approved the Administrator's decision in part and rejected it in part. The court of appeals concluded that the effluent values for BOD_5 in EPA's standards were supported by results obtained at Clinton Corn Processing Co.'s plant at Clinton, Iowa, where a new treatment system had been constructed, if the Clinton Corn data were adjusted and interpreted to upgrade them for projected operations at a new plant. (540 F.2d at 1334-1338; Appendix A *infra* at 8a-15a.) However, the court rejected EPA's values for the TSS parameter, on the ground that neither the Clinton Corn results nor results obtained at other plants in other industries supported the TSS values in the standards. (540 F.2d at 1338-1340; Appendix A *infra*, at 15a-19a.) The court again remanded the TSS portions of the standards to the Agency, but with the explicit instructions either to revise the originally set TSS values upward to particular values which the court opined were supported by the record,[10] or to conduct further administrative proceedings in an effort to justify lower values.

In its second ruling on the new source standards for the corn wet milling industry, the court of appeals among other things implicitly dealt with the matter of whether EPA's standards for new sources are always binding on such sources and have to be applied by rote in permits. The court of appeals held that EPA need not provide in its corn wet milling new source standards for the statistically expected "excursions" from the numerical values in the

[10] The court concluded that the record supported a 30-consecutive-day value of 25 pounds of TSS per "MSBu" (thousand standard bushels of shelled corn) and a daily-maximum value of 75 pounds of TSS per MSBu. (540 F.2d at 1340; Appendix A *infra*, at 19a.) These values are 250 percent greater than those set initially by EPA and maintained by the Agency as a result of the decision stemming from the first remand.

standards, because in the court's view the federally-issued or State-issued discharge permit for a particular new source could contain provisions allowing for excursions even though the standards themselves did not do so. (540 F.2d at 1338; Appendix A *infra*, at 14a-15a.) On the other hand, the court of appeals did not consider or refer to possible different permit terms in addressing and rejecting the milling companies' claim that the new source standards were invalid because EPA had failed to take into account higher raw waste loads and resulting increased effluents at those plants which would have a product mix including modified starches rather than just sweeteners and syrups. (540 F.2d at 1336; Appendix A *infra*, at 12a.)

3. *The Agency's recent amendment of the standards to comply with the second decision of the court of appeals.* EPA did not conduct further administrative proceedings after the second remand. Instead, the Agency adopted the court's suggestion that it amend the originally-set TSS values upwards to the values which in the court's view had some support in the record. See 41 *Fed. Reg.* 50823 (November 18, 1976), set out in Appendix E, *infra*.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Decision Rests Upon An Assumed Answer To The Question Whether EPA's New Source Standards Should Contain A "Safety Valve" Procedure.

The court of appeals did not address directly the issue whether EPA's new source standards should contain a "safety valve procedure".[11] Its decision does, however, touch upon the matter by implication. As noted *supra*, at 8, the court refused to hold that EPA had to provide in its new source standards for the statistically expected excursions from the values in the standards, on the ground

[11] The reference to a "safety valve procedure" stems from *WAIT Radio* v. *Federal Communications Commission*, 135 U.S. App. D.C. 317, 418 F.2d 1153, 1157 (1969).

that a permit with terms to "remedy the problem" could be issued for a particular new source.[12] (540 F.2d at 1338; Appendix A *infra*, at 14a-15a.) In the *du Pont* cases in this Court, EPA has contended that its new source standards are "ironclad" and that they must be applied by rote in permits for new plants. Brief for the Administrator at 7-9 and 13, *E. I. du Pont de Nemours & Co.* v. *Train*, Nos. 75-1473 and 75-1705. By asserting that its standards are "ironclad", EPA thus would not allow the permit adjustment for excursions upon which the court of appeals relied. In addition, the decision of the court was itself not consistent on the matter of a "safety valve". In the court's disposition of the issue arising because of variations in products at the corn wet mills, the option of permit limitations differing from the standards was not recognized. (540 F.2d at 1336; Appendix A *infra*, at 12a.)

The decision of the court of appeals thus demonstrates the close interrelationship between the effect to be accorded the standards and the matters which must be reflected in them lest they be arbitrary and capricious. Because this Court has before it in the *du Pont* cases the issue which is presented here, the corn wet milling petitioners suggest that it would be appropriate for this Court to grant this petition and to remand the matter summarily in light of the Court's decision in the *du Pont* cases.[13] Whichever way this

[12] Permits could correct the deficiency in the standards by providing that the maximum short-term pollutant limitations in the permit could be exceeded on a specified number of occasions during a year, with the number of allowable excursions determined on the basis of the statistical premise for calculating the standards. See *supra*, at 6 n. 8.

EPA's "national primary and secondary ambient air quality standards" issued under Section 109 of the Clean Air Act, 42 U.S.C. § 1857c-4, contain provisions for such "excursions". See 40 C.F.R. § 50.9 (standard for photochemical oxidants—"maximum 1-hour concentration not to be exceeded more than once per year").

[13] Then, in light of this Court's discussion in the *du Pont* decision, the court of appeals could reassess its rulings respecting the second and third questions presented here. While petitioners believe the court of appeals could consequently order appropriate provisions to be incorporated in EPA's standards, especially respecting excursions, this suggested disposition would leave in existence the conflict among the circuits over excursions.

Court resolves the "safety valve" issue in the *du Pont* cases, a remand to the court of appeals in this case would seem to be necessary. As discussed, the court here arguably adopted by implication an inconsistent stance on the issue. It should reconsider its ruling in light of this Court's action in the *du Pont* cases.

II. There Is A Conflict Among The Courts Of Appeals Over Whether EPA Is Obliged To Provide In Its Standards For Statistically Expected "Excursions" From The Effluent Values Specified In The Standards.

EPA's effluent regulations, whether they be new source standards or "effluent limitations guidelines" express the values for pollutant parameters as "never to be exceeded" terms. See *e.g.*, the standards at issue here, 40 C.F.R. § 406.15, reproduced *infra*, at 3e. Yet the statistical methods used to calculate the short-range values present in the regulations do not by definition account for all the values obtained by use of the requisite technology at well-run representative plants. See *supra*, at 6 n.8 and 10 n.12. A very small but important set of expected values ("excursions") remain unaccounted for by the short-term values in the regulations. A new source would be subject to civil or criminal penalties when the excursions occurred, unless the regulations or the plant's permit exempted the excursions. (See §§ 306(e), 309, 402(k), and 505.)

In *FMC Corp.* v. *Train*, 539 F.2d 973, 986 (4th Cir. 1976), the Fourth Circuit considered EPA's failure to provide for excursions in the Agency's new source standards and effluent limitations guidelines for the plastics and synthetic materials category. The court opined that "[p]lant owners should not be subject to sanctions when they are operating a proper treatment facility." (*Id.*, 539 F.2d at 986.) It concluded that "EPA should provide an excursion provision that will offset the expected . . . violations" (*id.*), while observing that EPA had previously incorporated such provisions in regulations issued under the Clean Air Act—

> "Such excursions are provided for by the ambient air standards established under the Clean Air Act, 40 C.F.R. §§ 50.4-50.10, and this Court sees no reason why appropriate excursion provisions should not be incorporated in these water pollution regulations."
>
> (*Id.*)

See also *Essex Chemical Corp.* v. *Ruckelshaus*, 158 U.S. App. D.C. 360, 486 F.2d 427, 432-433 (1973), *cert. denied sub nom. Appalachian Power Co.* v. *Environmental Protection Agency*, 416 U.S. 969 (1974).

By way of contrast, the Tenth Circuit in *American Petroleum Institute* v. *Environmental Protection Agency*, 540 F.2d 1023, 1035-1036 (10th Cir. 1976), refused to rule that EPA had erred in not providing for excursions, while saying that there was "a theoretical chance that a plant achieving the limitations on a long-term basis will exceed the monthly and daily limits." (*Id.*, 540 F.2d at 1036.)

In the present case the Eighth Circuit reached a compromise on the issue by declaring that the standards did not have to contain an "excursions" clause but that a permit for a particular new source could "remedy the problem". (540 F.2d at 1338; Appendix A *infra*, at 14a-15a.)

These conflicts among the Fourth, Eighth, and Tenth Circuits are especially troublesome because the issue in conflict will arise both in the context of regulations and permits and in the area of enforcement.[14] The conflicts justify the grant of certiorari to review the Eighth Circuit's judgment in this case.

[14] As matters now stand, given EPA's failure to carry out the decisions either of the Fourth or of Eighth Circuits, in those circuits a permittee would have available an "excursions" defense to a charge of violation of a permit, notwithstanding the provisions of Section 509(b)(2) of the Act, 33 U.S.C. § 1369(b)(2). (These provisions bar "review in any civil or criminal proceeding for enforcement" of any action by the Administrator which could have been the subject of review under the jurisdictional grant provided by Section 509(b)(1), including, for example, the Administrator's promulgation of new source standards under Section 306.) In the Tenth Circuit such a defense arguably would not be available.

III. The Eighth Circuit's Decision Errs In Approving The Agency's Failure To Make Any Provision In The New Source Standards For Product-Mix Variations And The Different Effluents Resulting From Manufacture of Disparate And Diverse Products At Corn Wet Mills.

In the Administrator's decision of November 1975 not to revise the new source standards for corn wet mills, the Agency conceded that "product mix variations may indeed have some influence on raw waste characteristics of corn wet milling wastes." See *supra*, at 7. Nonetheless, the Agency says that it has to date found no method to correlate this factual circumstance to the standards. (40 *Fed. Reg.* at 52018; Appendix D, *infra*, at 2d-3d.) The standards fix single values dependent upon quantity of raw materials processed, without regard to the varying products manufactured and the varying effluents resulting from the different product mixes. The court of appeals approved this approach, or rather, lack of approach, on the ground that the Agency had not ignored the matter. (540 F.2d at 1336; Appendix A, *infra*, at 12a.) The court erred; it did not fully meet its obligation to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

A new corn wet milling plant manufacturing a product such as a modified starch which generates an effluent significantly greater than a plant producing corn syrups or sweeteners should be subject to effluent requirements which reflect "best available demonstrated control technology" (§ 306(a)(1)) for its own operations, not those of the syrup or sweetener plant.[15]

[15] Section 306(b)(2) specifies that the Administrator "shall consider the type of process employed (including whether batch or continuous)" in adopting new source standards for an industry. In the corn wet milling plants, physically separate and technologically different processing lines are used for corn syrups, corn sweeteners, modified starches, and other classes of products.

In any event, the decision of the court of appeals should be reassessed in light of this Court's decision in the *du Pont* cases respecting whether EPA's new source standards are "ironclad" or whether they should incorporate a "safety valve procedure".

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit. The second and third questions presented by this petition are important and deserve the Court's attention.

Alternatively, because the first issue in this case is also presented by the *du Pont* litigation presently pending before this Court, and because the other two issues in this case are closely tied to this issue, this Court may deem it appropriate to grant the petition and summarily to remand this case to the Eighth Circuit for further proceedings to be taken in accordance with this Court's *du Pont* decision. This suggested disposition would not resolve the present conflict among the circuits respecting the issue arising with statistically expected excursions from the values in EPA's standards. It would nonetheless offer the court of appeals an opportunity to clarify the issues in light of the *du Pont* case.

Respectfully submitted,

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JANUARY 14, 1977

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 74-1448

CPC INTERNATIONAL INC., ET AL.,
Petitioners,

v.

RUSSELL E. TRAIN, ET AL.,
Respondents.

Petition for Review of Action of the Administrator of the Environmental Protection Agency.

Submitted: March 9, 1976

Filed: August 18, 1976

Before MATTHES, Senior Circuit Judge, HEANEY and WEBSTER, Circuit Judges.

HEANEY, Circuit Judge.

The petitioners, representatives of the corn wet milling industry, seek direct review of regulations promulgated by the Environmental Protection Agency setting forth standards of effluent discharges for new plants in this industry under §306 of the Federal Water Pollution Control Act Amendments of 1972. 33 U.S.C. §1316.

The new plant standards are before us for the second time. In *CPC International Inc. v. Train*, 515 F.2d 1032, 1034 (8th Cir. 1975) (*CPC I*), we held that this Court had jurisdiction to directly review the standards for new plants under §509(b) of the Act. We also held that this Court did not have such jurisdiction with respect to existing plant guidelines, a position to which we continue to adhere. *Id.* at 1036-1043.[1] We also held that there was not sufficient

[1] Three other Circuits have reached a contrary interpretation. *See American Frozen Food Institute v. Train*, No. 74-1464, at slip op. 5, 37-38 (D.C. Cir. May 11, 1976); *American Iron & Steel Institute v. E.P.A.*, 526 F.2d 1027, 1042 (3rd Cir. 1975); *Amer. Meat Institute v. Environ. Protect. Agcy.*, 526 F.2d 442, 452 (7th Cir. 1975). Two other Circuits have decided that they need not decide the question of the Administrator's power, and that "any action taken by the Administrator under §304(b) should properly be considered to be pursuant to the provisions of §301," permitting such action to be directly reviewed pursuant to §509(b). *E. I. du Pont de Nemours and Company v. Train*, 528 F.2d 1136, 1142 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3385 (U.S. April 20, 1976) (No. 75-978). *Accord, American Petroleum Institute v. Train*, 526 F.2d 1343, 1346 (10th Cir. 1975).

The District of Columbia Circuit suggests that we "failed to see the forest for the trees." *American Frozen Food Institute v. Train, supra* at slip op. 37 n.5. We deny faulty vision. The italicized quotations from the legislative history in the *American Frozen Food* decision, *id.* at slip op. 10-25, are ambiguous. For that reason, this Court, which was the first to attempt to unravel the Gordian knot, felt it essential to probe the legislative history more deeply and to go beyond the ambiguous passages relied upon by the Court in *American Frozen Food*. As a result of our study, we reached the conclusion that nonambiguous passages of the legislative history and of the statute itself compelled an interpretation of the Act which differed from that of the EPA. These nonambiguous clues to the statute's meaning are discussed at length in our decision in *CPC International Inc. v. Train*, 515 F.2d 1032, 1038-1043 (8th Cir. 1975) (*CPC I*).

For example, one fundamental impediment to the EPA's interpretation of the Act remains unanswered. Section 402(d)(2) expressly provides that the EPA may halt issuance of any state-issued permit if it determines that the conditions of the permit do not comply with the guidelines issued under §304(b). *See id.* at 1037 n.11, 1038 and 1038 n.14. The reference in this veto provision to the §304(b) guidelines and the extensive debate which preceded the addition of §402(d)(2) to the final draft of the statute are inconsistent with the EPA's contention that it has the power to issue effluent limitations for existing plants by regulation under §301. The District of Columbia Circuit and the Seventh Circuit ignore this language. The Third Circuit deals with the language, *see American Iron & Steel Institute v. E.P.A., supra* at 1040-1041, but its reasoning is unpersuasive.

evidence in that record to support the new plant standards promulgated by the EPA and remanded the matter to it with instructions to either:

> furnish support for the new source standards previously published, or establish new ones which can be achieved with the best available demonstrated control technology.

Id. at 1050 (footnote omitted).

We also instructed the EPA to update its projected cost figures.

On remand, the EPA undertook a review and reconsideration of the new plant standards. Following appropriate

Conclusory statements to the effect that our interpretation of the EPA's power "emasculates" the Act, *American Frozen Food Institute v. Train, supra* at slip op. 36, are a distortion of reality. As we noted in *CPC International Inc. v. Train, supra* at 1037 n.11, the guidelines promulgated under §304(b) are to be as precise as possible. Coupled with the EPA's veto power over permits which fail to comply with their requirements, the guidelines will achieve the goals which the EPA seeks to achieve by means of effluent limitations promulgated under its purported §301 power. Under our ruling, the limitations written into individual permits for existing point sources should be substantially similar to those written into permits if the EPA's theory of the Act were to be adopted.

The only practical difference resulting from this Court's interpretation of the statute is that the §304(b) guidelines for *existing* sources must be reviewed first in the District Court, while the §306(b) standards of perfomance for *new* plants—often based on the same scientific research and conclusions—must be reviewed first in the Court of Appeals. This practical anomoly is demonstrated here. *Compare CPC International Inc. v. Train, supra* at 1046, 1046 n.29 (finding that the "1977 technology," when employed in a *new* plant, would enable it to comply with the 1977 guidelines) *with Grain Processing Corporation v. Train*, 407 F.Supp. 96 (S.D. Iowa 1976) (finding that the "1977 technology," when employed in an *existing* plant, cannot assure compliance with the 1977 guidelines). We acknowledge this practical difficulty. But the presence of this anomoly does not justify the conclusion that the Act is "emasculated;" nor does a court emasculate an enactment by enforcing it as written. We cannot disregard the intention of Congress and rewrite the statute simply because of the practical problem of initially reviewing two closely related sets of regulations at two different levels in the judicial system. We also acknowledge that judicial resources will be wasted by requiring review at the District and Appellate Court levels.

The recent grant of certiorari by the Supreme Court in *E. I. du Pont de Nemours and Company v. Train, supra*, is a hopeful sign that a definitive resolution of these issues is forthcoming.

administrative procedures, the EPA resubmitted the standards previously promulgated.

The petitioners contend that:

(1) the EPA failed to give a fair and reasoned consideration of its new source standards and instead prematurely and arbitrarily adopted its original standards;

(2) the EPA erred in determining that the 1977 guidelines can be met by new plants utilizing proposed 1977 technology;

(3) the EPA erred in holding that the addition of deep bed filtration will enable industries to meet the proposed new source standards; and

(4) the EPA erred in determining that the suggested technology could be acquired within the cost figures projected by it and in determining that the industry could afford to build new plants incorporating the technology necessary to achieve the new source standards.

I. THE EPA ACTED PROPERLY ON REMAND.

We are not entirely satisfied with the record made by the EPA on remand. Much of the data in the record is presented without careful collation, evaluation and simplification. Much of the statistical information is quantified in units of measurement other than those used in the proposed standards, pounds per thousands of bushels, thus making it difficult for us to determine whether the data supports the EPA's conclusion. Expert opinion is frequently unsupported and little, if any, effort is made to make scientific testimony understandable.

Nonetheless, we cannot say that the new source standards should be set aside in their entirety on the grounds that the EPA prematurely and arbitrarily rubber stamped the previously approved standard. It did substantially more than this. It retained expert consultants to assist in the decision-making process, it undertook a review of the experience of other municipal and industrial users in the United States and abroad, it undertook a review of the

literature in the field, and it made a serious and a partially successful effort to obtain all available information from presently operated corn wet milling plants.

II. THE RECORD SUPPORTS THE CONCLUSION OF THE EPA THAT THE 1977 EXISTING PLANT GUIDELINES CAN BE MET BY NEW PLANTS UTILIZING THE PROPOSED 1977 TECHNOLOGY.

The petitioners, in effect, seek to relitigate issues decided in our first opinion. In *CPC I*, we held that:

(1) the new source standards are identical to the 1983 guidelines for existing plants;

(2) the new source standards/1983 guidelines "are predicated on the availability of the 1977 technology plus the addition of deep bed filtration;"

(3) the EPA did not err "in determining that the 1977 technology, when employed in a new plant, would enable it to comply with the 1977 guidelines;" and

(4) the EPA adequately considered contentions of the industry pertaining to "shockloads," "variability" and "excursions" in determining the 1977 existing plant standards. *CPC International Inc. v. Train, supra* at 1045, 1046 and 1046 n.30 (footnotes omitted).

The petitioners suggest that the data presented initially and on remand does not support the EPA's conclusion that the 1977 existing plant guidelines, upon which the final new plant standards are based, can be met. They argue that the EPA has failed to adequately consider the raw wasteload of the corn wet milling industry, the variation of the wasteloads according to the particular product produced, the temporary "shockloads" of waste created upon shifts from one product process to another or the "excursions" or high waste level concentration that occurs in this industry from time to time.[2]

[2] Since we determined in *CPC I* that the 1977 guidelines could be met by new plants, the petitioners' attempt to relitigate this issue would ordinarily be barred by the doctrine of the law of the case. *See United*

We have carefully reviewed the entire record and remain convinced that new plants constructed with proper in-plant controls and an adequate activated sludge or similar treatment facility can meet the 1977 existing plant guidelines of removing all but 50 pounds each of BOD_5 and TSS per MSBu.[3] The record discloses that two existing plants without all of the available technology proposed for use in a treatment facility or appropriate in-plant controls have met or nearly met the 1977 guidelines. At the American Maize plant, the monthly figures of January through March, 1975, are below the 1977 standards. At CPC-Corpus Christi during the period of December, 1974 through April, 1975, the monthly BOD_5 effluent level is just above the maximum thirty-day period 1977 guidelines. These plants have achieved this level of effluent reduction even though they have been inhibited in their efforts by space and design limitations. New plants are being designed to avoid such limitations.

We recognize that the District Court for the Southern District of Iowa in *Grain Processing Corporation v. Train*, 407 F.Supp. 96 (S.D. Iowa 1976), held that the 1977 guidelines cannot be met by existing plants. That decision is not before us here. We are concerned only with the standards for new plants. The District Court's decision is on appeal to this Court and will be considered in due course. We note only that a new plant can incorporate in-plant controls and surface condensers with moderate expense

States of America v. Burton A. Librach, No. 76-1060, slip op. at 8 (8th Cir., June 17, 1976); *Hawkes v. Internal Revenue Service*, 507 F.2d 481, 482 n.1 (6th Cir. 1974); *Thornton v. Charter*, 109 F.2d 316, 320 (8th Cir. 1940). However, after examining this augmented record, we determined that it would be helpful to expand upon and reassert our prior decision as the ability of new plants to meet the 1977 guidelines is an important intermediary step in ascertaining whether new plants can meet the final proposed new plant standards.

[3] BOD_5 is the five-day biochemical oxygen demand pollution factor, explained more fully *infra*. TSS is the total suspended solids pollution factor, explained more fully *infra*. MSBu expresses these pollutant measurements in terms of pounds per thousand standard bushels of corn processed. The 50-pound guideline refers to the maximum average of daily values for a thirty consecutive day period, the guideline period and measurement proposed by the EPA.

and inconvenience while existing plants have more difficulty in converting to this technology.

We affirm our decision in *CPC I* that the EPA did not act arbitrarily or capriciously in concluding that the 1977 technology employed in a new plant would enable it to meet the 1977 existing plant guidelines.

III. THE PROPOSED NEW PLANT STANDARDS FOR BOD_5 CAN BE MET; THE PROPOSED NEW PLANT STANDARDS FOR TSS CANNOT BE MET.

Section 306(a)(1) of the Act, 33 U.S.C. §1316(a)(1), states that the new source standards are to reflect:

> [T]he greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where applicable, a standard permitting no discharge of pollutants.

Our task is to determine whether the EPA's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *CPC International Inc. v. Train*, *supra* at 1044.

The EPA has proposed that a new plant in the corn wet milling industry shall achieve an average of daily values for thirty consecutive days that shall not exceed an effluent level of 20 pounds of BOD_5 and 10 pounds of TSS per MSBu. This standard is to be reached through the use of a complete activated sludge system to reduce the wasteload to 50 pounds each of BOD_5 and TSS per MSBu, the 1977 guidelines, and a subsequent reduction of 30 pounds of BOD_5 and 40 pounds of TSS per MSBu through the addition of a deep bed filtration system. The EPA asserts that the experience of the Clinton corn plant treatment facility, which includes the use of deep bed filtration, supports the new source standards. It contends that deep bed filtration is a demonstrated technology in the treatment of waste-

water in municipal and industrial plants and its use has resulted in effluent discharges containing essentially no suspended solids. It finally asserts that deep bed filtration technology can be transferred to the corn wet milling industry with approximately the same successful rate of BOD_5 and TSS effluent level reduction. The petitioners deny these assertions.[4]

A. BOD_5

We consider initially whether the conclusion of the EPA that the 20-pound BOD_5 standard can be met, is arbitrary and capricious.[5]

1. Clinton Corn Results.

On remand, data from the Clinton Corn plant became available. Clinton Corn is a large corn wet milling plant at which a new waste treatment facility has been constructed. It utilizes much of the EPA proposed technology, including deep bed filtration. The Clinton treatment facility began operations on January 1, 1974, and data for the period from November, 1974 to September, 1975, was utilized by the EPA in setting the proposed standards.

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[4] One of the principal difficulties in reviewing this record and that of the EPA in setting a new plant standard, is the lack of any existing plant within the industry that includes all of the proposed in-plant controls and suggested treatment facilities. The need to be able to rely on an exemplary existing plant or to create a pilot system to demonstrate the efficacy and availability of the proposed technology is recognized by the EPA. A newsletter published by the EPA and included in the record of this case states:

> Despite the widely varying opinions found in the waste water filtration literature, a few areas of agreement are apparent. *One is the need to perform pilot plant studies in order to properly design waste water filters.*

J. Kreissel, "Granulor Media Filtration of Secondary Effluent" in News of Environmental Research in Cincinnati (December 13, 1974).

[5] BOD_5 is a pollutant measurement of the five-day biochemical oxygen demand. It reflects the oxygen-consuming capability of organic matter which will be fulfilled as the matter in the wastewater decomposes. It is a common measurement employed in the field of water quality.

The parties disagree as to the results achieved at Clinton.[6] The EPA concludes that a monthly average of 7.1 pounds per MSBu of BOD_5 for the eleven-month period and a monthly average of 4.5 pounds for the last seven months was achieved. The petitioners conclude that the averages were 15.0 and 7.5 pounds, respectively. Even if the petitioners' higher figures are used, it appears that:

(1) the eleven-month average is less than the standard set by the EPA;

(2) the seven-month average is at least 60% below the standard set by the EPA;

(3) only one month in the last seven exceeded 50% of the standard set by the EPA; and

(4) the treatment facility removed an average of 98% of the BOD_5 in the wastewater.

Moreover, the record supports the EPA's view that lower effluent standards can be reached if all known in-plant controls to prevent spills and to equalize the effect upon the treatment facility if spills do occur are incorporated in the new plant.

The petitioners assert, however, that because only 65% of the wastewater flow generated at the Clinton plant goes through the treatment facility, the Clinton results are unreliable. The wastewater by-passing the treatment facility is generated from barometric cooling condensers and is discharged directly into receiving waters without treatment. The EPA suggested technology for cooling is surface condensers. This technology allows the cooling water to be recycled. The resulting wastewater volume is substantially reduced but it has higher concentrations of BOD_5. This waste must then be treated in the regular treatment facility.

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[6] The calculation to determine the amount of pollutant in terms of pounds per thousand standard bushels of corn processed (MSBu) requires several factors including the flow of water, actual grind data and the concentration of the effluent. Exact grind data was not made available for the Clinton plant. Both the EPA's and the petitioners' conclusion in terms of MSBu differ, at least partially, because of different assumed grind levels.

The EPA projected model plant, discussed *infra*, has a production capacity of 30,000 bushels and a proposed treatment facility capable of handling a wasteflow of 1.0 million gallons a day (mgd). The Clinton plant has a production capacity of 120,000 bushels or four times that of the model, but its present treatment facility is designed to treat only 3.0 mgd. As Clinton changes over to surface condensers, its treatment facility will have to be enlarged accordingly. There is no evidence in this record to suggest that this additional waste volume cannot be treated in the enlarged facility as effectively as the waste now being treated at Clinton. For our purposes, the crucial factor is that the Clinton treatment facility is effectively treating the BOD_5 wasteload it is designed to treat at a level which is consistent with the EPA proposed standards.

The petitioners also argue that the Clinton data should not be used because its treatment plant includes a "double stage" treatment process before filtration while the EPA model facility consists of a single stage. They argue that even if the Clinton plant performance for BOD_5 removal approaches that of the EPA standard, it does so only with more extensive technology at a higher cost than the EPA model facility.[7]

The EPA concedes that Clinton uses a double-stage pretreatment facility but properly notes that the raw waste equalization basin at Clinton is not designed to hold the raw wastes for the time required. It again calls attention to the lack of good in-plant controls.

We are convinced that the record supports the EPA's conclusion that the performance of the Clinton plant demonstrates that new plants designed and built to EPA standards can meet the BOD_5 standard of 20 pounds per MSBu.

2. EPA's Model Plant.

In preparation of the standards, the EPA synthesized a model corn wet milling plant and corresponding treatment

[7] The adequacy of the size and cost of the treatment facility proposed by the EPA will be discussed in Section III, Part 2, *infra*, and Section IV, *infra*, respectively.

facility from data received from the corn wet milling industry and from other industries that encounter similar wastewater. The model contained most of the best technology and procedures presently used or practiced in the industry. It is from this model and its estimated ability to reduce the projected wasteloads that the EPA set the proposed new plant standards.

The petitioners challenge two of the projections made by the EPA in synthesizing its model plant. First, they assert that the EPA erred in not considering the additional wastewater flows of between 90 and 250 pounds of BOD_5 per MSBu that result from the use of wet water scrubbers. Second, they assert that the EPA erred in failing to accurately account for the higher concentrations of BOD_5 that result from the production of modified starches. These errors, they assert, render the effluent-level reductions inaccurate.

The petitioners do not dispute that the alleged additional wastewater flows could not be effectively treated by the proposed technology. They argue only that the capacity of the model treatment plant may be insufficient to handle the volumes or concentrations of this additional wastewater.

Our review of the record discloses that the petitioners' conclusion on the increased wastewater generated by the wet water scrubbers is based upon preliminary and conflicting data. The most persuasive of these inconclusive estimates is that an additional flow of 90 pounds of BOD_5 per MSBu may be created.[8] As set forth above, the Clinton treatment facility has consistently achieved a 98% BOD_5 reduction over an eleven-month period during which the influent has varied considerably in terms of concentration and amount. If this additional 90 pounds were treated at the Clinton facility, the seven months BOD_5 effluent averages of 4.5 of the EPA and 7.5 of the petitioners would be increased to 6.3 and 9.3, respectively. Both of these figures

[8] There is also evidence in the record that the wastewater from the wet scrubbers could be recycled and reused in the production process with a result that little of the wastewater would reach the treatment facility directly.

remain well below the EPA proposed standard of 20 pounds of BOD_5 per MSBu.

The record also discloses that the EPA did take into consideration the increased wasteloads generated by the production of modified starches. The EPA compiled data of actual performance results from newer existing mills that produce both conventional corn syrups and modified starches and also the projections for new plants, submitted by the industry, in order to determine the wastewater flow and influent levels for the model plant. Moreover, it is undisputed that the Clinton plant produces a variety of end products including modified starches. Both the Clinton wastewater load and influent levels of BOD_5 approximate the projections set out for the EPA's model plant.

Furthermore, the data relied upon by the petitioners to show increased wasteloads because of modified starch production must be contrasted with other data showing no appreciable influent increase. As stated by a representative of CPC in a report to the EPA, there were a number of occasions when the production of modified starches increased the wasteload substantially and:

> about an equal number of times when there did not seem to be any effect. No explanation has been found for this problem.

Letter from R. L. Hap of CPC International to Dr. H. E. Schwartz, Jr., June 25, 1975.

Based on the model plant data, we cannot say that the EPA ignored the effects of additional waste produced by the production of modified starches nor did it act in an arbitrary or capricious manner in calculating the effect of this waste in preparing its model plant.

3. Variability and Excursions.

The petitioners also assert that the EPA's standard for the average maximum values for thirty consecutive days of 20 pounds of BOD_5 per MSBu fails to adequately account for variability factors. They argue that if the EPA desires to set short-term thirty-day standards based on long-term

averages, that the EPA must ensure that mills not violating the annual averages will also not violate the thirty-day average and daily maximums. The petitioners argue that the EPA considered variability factors only upon the expected results of its model plant and that the EPA failed to adequately consider the variability factors realized at existing plants.

The record discloses that the EPA did adequately consider variability. It took the long range effluent data from the CPC—Pekin and American Maize plants and determined the 99% to the mean monthly variability factor to be 2.7 and 1.9, respectively. This range encompasses the 2.6 variability factor for the Clinton plant estimated by the petitioners. Multiplying these factors upon the monthly average for the last seven months at Clinton as increased by additional effluent from the wet scrubbers, the range is between 12 and 17 pounds of BOD_5 per MSBu utilizing the EPA's figures and between 17.7 and 25.1 pounds utilizing the petitioners' conclusions of the Clinton data. All but the last projection is within the proposed BOD_5 standard.

Moreover, there is support for the EPA's contention that strict statistical computation of the variability factor for new plants based upon existing plant results creates an artificially high number. New plants equipped with complete in-plant controls and a properly designed and operating treatment facility should be less prone to the variations of influent created by the lack of similar facilities in existing plants and, therefore, the variation factor in a new plant should be lower.

There is also support in the record for the maximum value for any single day of 60 pounds of BOD_5 per MSBu. This single day allowance of three times the thirty-day average provides sufficient flexibility for high effluent days.

Finally, the petitioners contend that even if the variability factors utilized by the EPA are accurate and provided that the maximum day and thirty-day averages can be met, the EPA has not included sufficient consideration for the "excursions" above these levels that will occur in setting these standards. They argue that the variability factors

utilized account for 99% of all predictable performance with the remaining one percent of the results from a plant expected to exceed the value calculated as the 99% maximum. The petitioners assert that because the EPA has not provided any variances for these excursions, effluent levels may exceed the allowable maximum daily level several days within a year despite the fact that the plant is meeting the yearly average.

The record reflects that this complaint is not well founded. The excursions in this industry are primarily the result of inadequate facilities, including insufficiently-sized aeration or retention basins and the failure to provide dikes and other in-plant controls to reduce the effect of in-plant spills. New plants, properly designed and constructed, should not experience this same difficulty. Dr. Raymond C. Loehr, an expert in the treatment of high strength organic wastes, has concluded:

> No excursions are necessary. The variability factors that are developed are based upon existing data. There are many steps that industry can take to reduce the variability and not exceed the limitations. It is reasonable to expect that based upon the use of better treatment technology and control, attention to treatment plant maintenance and operations, and concern about in-plant waste control, industry can reduce the existing variability by at least 1%, the amount inferred by the use of the 99/50 ratio, to obtain the limitations. In fact it is reasonable to expect that such variability can be reduced by perhaps 5% by means of the variability controls identified earlier.

R. C. Loehr, EPA Memorandum on "Effluent Variability Factors," (June 26, 1975).

The record indicates that there remains the possibility of a rare occasion when the daily effluent level may exceed the maximum daily standard of 60 pounds because of inadvertent error or Act of God. The EPA has established the policy of informally working with the plant that suffers from such infrequent or isolated violations to attempt to remedy the problem causing the violation without the necessity of bringing any formal or court action. See EPA,

"Guidelines for Water Pollution Enforcement," 8 (July 23, 1974). If the effluent limitations in a federally-issued permit prove to be unreasonable or cannot be met for cause beyond the control of the permittee, the permit may be revised. Id. See also §306(b)(1)(B), 33 U.S.C. §1316(b)(1)(B).

The EPA has not acted arbitrarily or capriciously in its consideration of variability or excursions.

4. Conclusion.

The EPA has set the new plant effluent standards for BOD_5 at 20 pounds per MSBu as a maximum average daily value for thirty consecutive days and 60 pounds per MSBu as the daily maximum. The Clinton Corn plant treatment facility contains much of the "end of the pipe" technology proposed by the EPA. During the last seven months of available operational data, the Clinton plant achieved a thirty-day average BOD_5 effluent of 4.5 pounds, utilizing the calculations of the EPA or 7.5 pounds if the calculations of the petitioners are used. If these amounts were increased because of additional waste flow from the wet scrubbers and when a variability factor of between 1.9 and 2.7 is applied, the results range from 12 to 17 pounds of BOD_5 per MSBu utilizing the EPA's calculations and 17.7 and 25.1 pounds if the calculations of the petitioners are used.

When these final totals are considered in the light of the problems experienced in the Clinton treatment facility and the lack of in-plant controls in the Clinton processing plant, they provide adequate support for the EPA's proposed standard of 20 pounds of BOD_5 per MSBu as a thirty-day average. We find, on the basis of this record, that the BOD_5 standard set by the EPA is neither arbitrary nor capricious and is in accordance with law.

B. TSS

We turn to a consideration of whether the conclusion of the EPA that the 10-pound TSS standard can be met is arbitrary and capricious.[9]

[9] TSS is the pollutant measurement of the total amount of suspended solids, inorganic and organic, in the wastewater.

1. Clinton Corn and Other Corn Wet Milling Plant Results.

As in the BOD_5 measurements at the Clinton plant, there is a disagreement in the pounds per MSBu figure for the effluent level of TSS. The EPA concludes that a monthly average of 17.6 pounds for the last eleven-month period and an average of 16.0 pounds for the last seven months was achieved. The petitioners conclude that the averages were 34.8 and 25.6 pounds, respectively.

The EPA argues that data for the months of July, August and September of 1975 supports the TSS standard of 10 pounds per MSBu. Considering the EPA's conclusions of the Clinton data and eliminating one usually high effluent day, the following effluent levels were achieved:

1975	BOD_5 (lbs/MSBu)	TSS (lbs/MSBu)
July	4.6	9.3
August	2.1	8.5
September	1.7	5.2

This data reveals:

(1) that the 10-pound standard would be exceeded in every month when a variability factor of between 2.2 and 2.6 is applied to these results;[10] and

(2) that the TSS levels are uniformly higher than BOD_5 levels even when the treatment is achieving maximum performance levels.

The EPA suggests that this second conclusion indicates that the BOD_5 standard could be lowered. We find little merit to this suggestion. When surface condenser wastes and variability factors are given appropriate consideration, the BOD_5 standard appears to be as low as can be consistently achieved.

In each of the eleven months of data available from Clinton, the TSS effluent levels have exceeded the corresponding BOD_5 levels.[11] Specifically, the TSS levels range from 3.5 to 24.5 pounds higher than BOD_5 levels. In short, the TSS standard proposed by the EPA finds no support from the Clinton plant data. The effluent levels achieved at other corn wet milling plants, namely CPC—Pekin and American Maize, is equally unsupportive.

[10] This variability factor range is derived from long range data at CPC —Pekin and American Maize. It encompases the 2.3 TSS variability factor for the Clinton plant estimated by the petitioners.

2. Effluent Level Reduction in Other Industries.

Recognizing the lack of support for its proposed TSS standards from results within the corn wet milling industry, the EPA points to the use of deep bed filtration in other industries. It argues that these results support the proposed TSS standards for the corn wet milling industry. In our judgment, the results from other industries indicate that deep bed filtration will remove suspended solids but not with the efficiency or the consistency necessary to satisfy the proposed TSS standard for this industry.

The studies relating to municipal treatment plants indicate that deep bed filtration will remove an average of 70% of the suspended solids in the wastewater. However, the record also establishes that the removal rates range from a low of 20% to a high of 95% with no indication of consistency. Moreover, the level of suspended solid influent in most municipal treatment plants is considerably less than that found in the corn wet milling industry.

The record indicates that the strength or concentration of the influent wastewater substantially affects the success of deep bed filtration. If the wastewater has been effectively pretreated in a biological treatment system, deep bed filtration will remove a substantial percentage of the remaining suspended solids. However, one cannot say that a properly functioning system will reduce the TSS level below that of the BOD_5 level. In the winery industry, for example, treatment of heavily concentrated wastewaters similar to those found in the corn wet milling industry produce TSS levels that exceed the BOD_5 level by as much

[11] This fact is recognized by the Illinois state standard which provides for 20 mg/1 of BOD_5 and 25 mg/1 of TSS for corn wet milling plant effluent.

as 48 mg/1. Moreover, the deep bed filtration system there appears to remove less than 40% of the suspended solids.[12]

Data from the brewery and edible oil industries is largely unuseable because it is set forth in milligrams per liter and because it is not clear whether deep bed filtration is used or not in these industries. This data gives some support to the finding that corn wet milling plants can meet the 1977 existing plant guidelines but little or no support that 1983 or new source standards can be met. Again, TSS levels are often higher than BOD_5 levels.

The data from Morton Frozen Foods indicates only that TSS levels are often higher than BOD_5 levels and that there are wide variations in TSS levels between the minimum and maximum days.

3. Expert Testimony.

The EPA did present testimony from an acknowledged authority on filtration of wastewaters. Dr. Robert Bauman stated that he "would expect" a new corn wet milling plant utilizing complete pretreatment facilities and filtration systems to be able to meet the proposed new source standards. However, Dr. Bauman's report is replete with qualifications and, standing alone, is insufficient grounds to support this standard, particularly in light of the inability of any existing plant or pilot project to demonstrate the efficacy of this technology to consistently meet the proposed standard.

4. Conclusion.

The decision of the EPA that new corn wet milling plants can meet a TSS standard of 10 pounds per MSBu is an arbitrary and capricious one.

There remains the question of what our response to this inadequacy should be. Ordinarily, we would simply remand and instruct the EPA to develop a new standard for TSS

[12] Again, data from other industries has not been prepared in a manner to make direct comparison with the proposed new standards possible. Much of the data is in milligrams per liter and in some instances, the charts presented are unreadable.

and retain jurisdiction to review that new standard in an accelerated appellate proceeding. But there has been one remand, and more than eighteen months have been lost in achieving the national goal of cleansing our water. We, thus, feel the need to adopt a more flexible approach, one which will, hopefully, permit a new standard to be implemented forthwith. We are convinced from this record that a standard of 25 pounds of TSS per MSBu would not be an arbitrary and capricious one. Results at the Clinton Corn plant lend support to such a standard.[13]

On remand, therefore, the EPA may adopt a new source standard of a maximum average of daily effluent levels for thirty consecutive days of 20 pounds of BOD_5 and 25 pounds of TSS per MSBu and a maximum daily effluent level of 60 pounds of BOD_5 and 75 pounds of TSS per MSBu. We urge it to do so.

The EPA retains the authority, however, to take additional evidence in support of a lower TSS standard. If it adopts that course, we retain jurisdiction. We direct that the administrative process be completed in sixty days. The only question to be addressed on that limited remand would be the TSS standard. Issues raised and answered in *CPC I* or in this opinion should not be relitigated.

III. COSTS.

Section 306(b)(1)(B), 33 U.S.C. §1316(b)(1)(B) states in part:

> In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration

[13] In the five months when the treatment plant at Clinton was operating most effectively, the TSS levels averaged approximately 5 pounds more than the BOD_5 levels. During these five months, the TSS level, when multiplied by a variability factor of 2.6, averaged 25 pounds. Although the seven-month average of 16.0 exceeds 25 pounds, when the variability factor is considered, the record discloses that shockloads and malfunction of the filtration equipment at Clinton affected the TSS levels much more than it did the BOD_5 levels. There is support for the conclusion that improvements in the management and operation of the treatment facility and the filter would enable Clinton to consistently average 25 pounds of TSS per MSBu.

> the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

In *CPC I*, we instructed the EPA to reconsider its projections on the cost of achieving the effluent reduction proposed in its standards. We asked that operating and capital costs be projected independently and that the cost computations be based on current economic data. We noted that costs were of particular importance to this industry because profit margins are usually low, raw material costs are volatile and competitive substitutes sometimes make it difficult to pass on increased costs to the consumer. *CPC International Inc. v. Train, supra* at 1050-1051.

The EPA states that it has responded to the instructions of this Court. It asserts that its obligation under the Act is to demonstrate that the costs to be incurred in meeting the new source standard are reasonable. It asserts that capital and operating costs meet this standard.

The petitioners assert that the Act requires a "cost-benefit analysis" and that the EPA failed to make such an analysis; that the technology proposed by the EPA to meet the new source standards is insufficient to achieve the effluent reduction necessary; that the capital and operating costs for the necessary technology will impose an unreasonable burden on the industry; and that calculation errors make the economic analysis completed by the EPA inadequate.

A. A Cost-Benefit Analysis is Not Required; the Appropriate Test is One of Reasonableness.

The 1977 existing plant guidelines are to be determined by the use of the "best practicable control technology currently available." §301(b)(1)(A), 33 U.S.C. §1311(b)(1)(A). The legislative history of the Act indicates that the term "practicable" is to limit the use of available technology only where the additional technology necessary to achieve a marginal level of effluent reduction is wholly out of proportion to the cost realized. *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93rd Cong., 1st Sess. (Comm. Print 1973), at 170 [hereinafter

cited as *Leg. Hist.*]; *American Iron and Steel Institute v. EPA.*, 526 F.2d 1027, 1051 (3rd Cir. 1975).[14] The 1983 existing plant guidelines, set by the application of the "best available technology economically achievable," §301(b)(2)(A), 33 U.S.C. §1311(b)(2)(A), are to be governed by a standard of reasonableness without the necessity of a thorough cost-benefit analysis. *Leg. Hist.* at 170; *Amer. Meat Institute v. Environ. Protec. Agcy.*, 526 F.2d 442, 462-463 (7th Cir. 1975).

The new source standards are to attain the "greatest degree of effluent reduction" achievable through the use of the "best available demonstrated control technology." Section 306(a)(1), 33 U.S.C. §1316(a)(1). This standard exceeds the effluent level reduction of that required in the 1977 existing plant guidelines for the corn wet milling industry while the proposed 1983 existing plant guidelines are the same as the new source standards. The legislative history indicates that Congress felt that new plants could

[14] The concurring opinion of Judge Adams sets forth the obligation of the EPA clearly and succinctly:

> Section 304(b)(1)(B) instructs the Administrator to consider "the total cost of application of [the best practicable control technology currently available] in relation to the effluent reduction benefits to be achieved from such application . . ." when establishing guidelines for the 1977 effluent limitations. The elements of the total cost of applying the technology are not identified in the law itself. However, the legislative history of the Act may be used to support the notion that the term "total costs of application" encompasses not only the expense of erecting pollution control facilities but also the "external cost of potential unemployment, dislocation, and rural area development sustained by the community. . . ."
>
> Having accounted for the total costs of applying the requisite technology, the Administrator must consider those costs in relation to the benefits to be achieved from the application of the technology. The Act does not mandate an exacting quantitative comparison in the form of a *technical* benefit/cost analysis. Nevertheless, from the remarks of Senator Muskie in support of the conference bill it appears that, with respect to the 1977 guidelines, the Act does require the Administrator to make an analysis sufficient to indicate that "the additional degree of effluent reduction is [not] wholly out of proportion to the costs of achieving such marginal level of reduction. . . ."

American Iron and Steel Institute v. E.P.A., supra at 1075 (emphasis added, footnotes omitted).

realize effluent level reductions at a lower cost than existing sources because of the lower cost of constructing a new plant in comparison to retrofitting an existing facility and because technical alternatives may be made available for new plants which would not be suited for existing plants. *Leg. Hist.* at 172 and 797.

There is no language in §306 requiring a cost-benefit analysis. Rather, the EPA is required only to take costs under "consideration." We conclude, therefore, that a cost-benefit analysis is not required in determining the reasonableness of the cost of achieving the new source standards. *Accord, American Iron and Steel Institute v. E.P.A., supra* at 1059. What is required for new source standards is a thorough study of initial and annual costs and an affirmative conclusion that these costs can be reasonably borne by the industry.

B. The Technology Proposed by the EPA is Sufficient; the EPA's Capital Cost Estimates are Accurate.

The petitioners' argument that in-plant facilities, in addition to those proposed by the EPA, are necessary to meet the new source standards does not have support in this record. They suggest that additional evaporators costing $4.2 million must be installed solely for the purpose of reducing the volume of wastewater and to prevent overloading of the treatment facility. The record, however, supports the EPA's contention that evaporation is a common production process used in the industry without regard to pollution controls. Evaporation is used in most corn wet milling plants to concentrate the liquid corn syrup into products which can be readily shipped without the need to transport excess water. This process is also used to concentrate steepwater to recover the solids in the water for animal feed. Indeed, the EPA model new plant projects an estimated capital cost of $3 million for evaporation equipment in the production process. The only support for petitioners' claim that additional evaporation equipment is required is their own conclusory statement.

The petitioners' contention that additional entrainment separators, costing $634,000, are necessary must also be rejected. They have failed to support the need for this technology. Moreover, they argue, in another section of their brief, that the effectiveness of such separators has not been documented.

The petitioners also argue that the EPA's estimate of the incremental cost of installing surface condensers of $250,000 is too low. They claim that this cost will be $1 million. They argue that a new 30,000-bushel plant will require six condensers rather than the three proposed by the EPA and that the cost of each condenser is twice that projected by the EPA.

The petitioners base their conclusion that six condensers are needed on the experience of the CPC—Pekin plant. In our view, the comparison is not appropriate. The CPC—Pekin plant has a capacity of at least 60,000 bushels and a present water flow much larger than the amount projected for the proposed model plant. There is also no support for the petitioners' contention that each surface condenser will cost twice the amount projected by the EPA.

We also reject petitioners' contention that the capital costs of the treatment facility will significantly exceed those estimated by the EPA. All parties agree that the basic biological facility, designed to treat a BOD_5 load of 400 pounds per MSBu, would be approximately $3 million.

There is disagreement as to the cost of constructing the filtration unit. The petitioners' contention that the cost would be about $100,000 more than that estimated by the EPA [15] has strong support in the record.[16]

[15] The EPA's estimated cost for filtration equipment of $160,000 is not supported by the record, while the petitioners' projection of $260,000 is. The petitioners' estimate is based on a detailed consultant's report as to the cost of filtration equipment for the treatment plant at CPC—Pekin which treats a wasteload of 1.0 mgd, the amount projected for the 30,000-bushel model plant.

[16] The petitioners' argument that a "second stage" biological treatment costing $2.1 million is required to ensure that a new plant will meet the proposed standard based on the Clinton experience was rejected earlier. In fact, the only equipment used at Clinton that is not

In summary, the record supports the conclusion of the EPA that additional in-plant equipment, surface condensers, would have a capital cost of $250,000. The record also supports the conclusion that a basic biological treatment facility capable of handling 400 pounds of BOD_5 per MSBu would have a capital cost of $3 million. An additional capital cost of $260,000 would be realized in purchasing and installing the equipment needed for the filtration system.[17] The record does not support the contentions of the petitioners that additional equipment is necessary to meet the proposed new standards.

C. The EPA's Revised Operating Cost Estimates are Not Arbitrary or Capricious.

The operating cost estimates include capital recovery costs and operating and maintenance expense. The EPA estimates an annual capital recovery cost of $402,000 and an annual operating expense of $300,000. The petitioners suggest that annual capital recovery costs will be $1,359,000 and annual operating expense will be $906,000.

The major differences in capital recovery expense relates to petitioners' contentions that technology in addition to that suggested by the EPA is required and that the capital cost of some of the equipment is underestimated by the EPA. We have answered those contentions in an earlier section of this opinion. On the basis of our earlier discussions and assuming an annual capital recovery rate of approximately 12% (a rate agreed to by both parties), the annual capital recovery costs would be approximately $414,000.

included in the model treatment plant is a biological-packed tower or trickling filter. Evidence in this record suggests that such a facility, if needed, would cost $150,000 and would allow a reduction of the size of other equipment proposed in the model treatment facility.

[17] The petitioners also estimate that $409,000 must be added for filtration site preparation. This estimate includes a 35% contingency cost and a 44% related site expense among others. The EPA suggests, and our review of the record supports, the conclusion that this expense is encompassed within the $3 million basic treatment facility cost.

The parties agree that the operation and maintenance expense for the surface condensers will be $40,000. The EPA projects that similar expenses for the treatment facility, including filtration, will be $260,000. The petitioners project that these expenses will be $414,000 annually. The EPA's estimates are based upon the actual operating expense at the CPC—Corpus Christi plant from January to May, 1974, while the petitioners' estimate is based on data from the CPC—Pekin plant during this same time period. Both of these plants employed some of the elements of the EPA's proposed treatment facility, but neither utilized a filtration system. Both plants experienced higher operational costs than would be realized at a new plant because the treatment facilities were added in a piecemeal fashion and have been subject to numerous malfunctions. The wastewater flow to the Pekin treatment facility is 1.0 mgd, the amount proposed for the model plant, while that at Corpus Christi is less.

While we think petitioners' estimates to be more accurate, we cannot say that EPA's estimates are arbitrary and capricious. We, accordingly, accept EPA's finding that annual operating and maintenance will be approximately $300,000.[18]

In conclusion, the record supports the projection that the total operating cost for water pollution control equipment in a new 30,000-bushel corn wet milling plant will be approximately $714,000, including $414,000 capital recovery expense and $300,000 for actual operating and maintenance expense.

D. Despite Calculation Errors by the EPA, the Cost of Achieving the Effluent Reductions Required by the New Source Standards is Not Unreasonable.

To determine the economic impact of meeting the new source standards, the EPA hired a consultant to prepare an

[18] It should be noted that the waste sludge that is created by the biological treatment system can be centrifuged and concentrated for use as animal feed. The Clinton plant presently recovers a portion of its operating expense from this process.

economic analysis. Utilizing the treatment facility proposed by the EPA and historical cost data made available by the industry, the consultant estimated that a new 30,000-bushel plant would realize a return of investment of 17.1% without controls and 15.8% with the proposed controls.[19] He also forecasted a return on sales of 14.1% without controls and 13.4% with controls. He estimated larger returns on investment and sales for 60,000 and 90,000-bushel plants. Based on his analysis, the EPA concluded that the costs incurred were "reasonable" and set forth the proposed new standards for comment by interested parties as required by law.

More than thirty days after the formal comment period expired, a representative of the corn wet milling industry informed the EPA that the consultant had erred in determining revenue utilizing a dry basis corn syrup price with an estimation of the amount of product produced on a liquid basis. The correct calculation requires a liquid corn syrup price. The EPA's consultant, after review, conceded that he had erred. He admitted this error was substantial and suggested that estimated revenues should be reduced by as much as 20% and after-tax income by as much as 50%[20].

This error has a major impact on the earlier projections. A return on investment with this revision is now estimated to be 6.9% without controls and about 5.8% with controls. The return on sales with this revision is now calculated to be 6.6% without and about 5.7% with controls.[21]

Despite this reduction of the estimated economic viability of a new corn wet milling plant with or without pro-

[19] All conclusions by the consultant are expressed in after-tax income figures.

[20] An error of this magnitude reflects either a lack of competence or diligence by the consultant and the EPA. Part of the blame must be shared, however, by the industry for its procrastination in making the original data available in a logical form and in its tardiness in commenting upon the consultant's report.

[21] An increase in the costs of control by 20% would further decrease the return on investment by .3%; an increase in cost of controls by 20% would further decrease the return on sales by .1%.

posed controls, the consultant concluded that all three sized plants remain "economically viable in relation to general food processing industry standards of performance." Neither the consultant nor the EPA elaborated upon this conclusion.

The petitioners have not aided the Court in this matter. After raising the calculation error, they do not specifically challenge, either in their briefs or at oral argument, the conclusion of viability by the EPA and its consultant. They state only that:

> [a]ny further sensitivity adjustment to reflect lower revenues, higher waste treatment plant costs, or higher costs of capital, could reduce the net present value to the point at which new corn wet milling plants were not economically viable.

The only implication that can be drawn from this failure is that the rate of 6.9% on invested capital is adequate, a conclusion that we would find hard to accept or that the actual rate of return might be higher than that and it was better to let sleeping dogs lie.[22] No argument is made that the relatively minor sensitivity adjustment which we have made with respect to additional filtration capital cost of $100,000 is sufficient to affect the economic viability of a new plant.

Moreover, no argument is made that new plants without controls are economically viable with an estimated after-tax return on invested capital of 6.9% but are not viable if the additional cost of controls reduces the return on invested capital to approximately 5.7%.

Based on a careful review of a generally unsatisfactory record, we reluctantly conclude that the EPA has not abused its discretion or acted arbitrarily in ascertaining that the cost of achieving the proposed effluent level reduction for new sources in this industry is reasonable.

[22] There is evidence in the record that five new corn wet milling plants are presently being constructed. These new plants will increase the existing number by 30%.

V. SUMMARY.

We hold that the new source standard of 20 pounds of BOD_5 per MSBu as a maximum average of daily effluent values for a thirty consecutive day period set forth by the EPA is not arbitrary or capricious.

We hold that the new source standard of 10 pounds of TSS per MSBu as a maximum average of daily effluent values for a thirty consecutive day period set forth by the EPA is arbitrary and capricious.

We hold that neither capital costs nor capital recovery and operating costs have been shown to be arbitrary and capricious.

We remand to the EPA with directions to it to revise the TSS standard to 25 pounds per MSBu or to compile additional evidence to support a lower standard. If the EPA decides to present a lower TSS standard, we retain jurisdiction and direct that the administrative process be completed within sixty days. The only question to be addressed on that limited remand would be the TSS standard. Issues raised and answered in *CPC I*, or in this opinion, should not be raised.

Costs shall be divided equally among the parties.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

[JUDGMENT]

ORDER

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 74-1448

CPC INTERNATIONAL, INC., and
CORN REFINERS ASSOCIATION, INC.,
Petitioners,

vs.

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency and
JOHN QUARLES, as Deputy Administrator,
Environmental Protection Agency,
Respondents.

FILED AUG. 18, 1976
September Term, 1975
ROBERT C. TUCKER, CLERK

**Petition for Review of Action
of the Administrator of the
Environmental Protection Agency**

This cause came on to be heard on petition for review of action of the Administrator of the Environmental Protection Agency, appendix and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that this cause be and is hereby remanded to the said Administrator of the Environmental Protection Agency for proceedings consistent with the opinion of this Court this day filed herein.

August 18, 1976

Order entered in accordance with the opinion:

ROBERT C. TUCKER
Clerk, U.S. Court of Appeals, 8th Circuit.

APPENDIX B

The pertinent provisions of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 *et seq.*, are as follows:

§ 1316 [306]. National standards of performance—Definitions

(a) For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

Categories of sources; Federal standards of performance for new sources

(b) (1) (A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time

thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;
paperboard, builders' paper and board mills;
meat product and rendering processing;
dairy product processing;
grain mills;
canned and preserved fruits and vegetable processing;
canned and preserved seafood processing;
sugar processing;
textile mills;
cement manufacturing;
feedlots;
electroplating;
organic chemicals manufacturing;
inorganic chemicals manufacturing;
plastic and synthetic materials manufacturing;
soap and detergent manufacturing;
fertilizer manufacturing;
petroleum refining;
iron and steel manufacturing;
nonferrous metals manufacturing;
phosphate manufacturing;
steam electric powerplants;
ferroalloy manufacturing;
leather tanning and finishing;
glass and asbestos manufacturing;
rubber processing; and
timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of

such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving effluent reduction, and any non-water quality environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

State enforcement of standards of performance

(c) Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

Protection from more stringent standards

(d) Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of Title 26, whichever period ends first.

Illegality of operation of new sources in violation of applicable standards of performance

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

* * *

§ 1342 [402]. National pollutant discharge elimination system—Permits for discharge of pollutants

(a) (1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 407 of this title, and shall continue in force and

effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h) (2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

State permit programs

(b) At any time after the promulgation of the guidelines required by subsection (h) (2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such

State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a

permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

Suspension of federal program upon submission of State program; withdrawal of approval of State program

(c) (1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(h) (2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(h) (2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

Notification of Administrator

(d) (1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under

subsection (b) (5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

Waiver of notification requirement

(e) In accordance with guidelines promulgated pursuant to subsection (h) (2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

Point source categories

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

Federal enforcement not limited

(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

Public information

(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purposes of reproduction.

Compliance with permits

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless

the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

APPENDIX C

Regulations Involved

"NEW SOURCE STANDARDS" FOR THE CORN WET MILLING SUBCATEGORY OF THE GRAIN MILLS POINT SOURCE CATEGORY.

The rulemaking order promulgating the foregoing regulations is found at 39 *Fed. Reg.* 10512 (March 20, 1974). A portion of the preamble of the order and the text of the standards is as follows:

Title 40—Protection of the Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

Subchapter N—Effluent Guidelines and Standards

PART 406—GRAIN MILLS POINT SOURCE CATEGORY

On December 4, 1973, notice was published in the FEDERAL REGISTER (38 FR 33438), that the Environmental Protection Agency (EPA or Agency) was proposing effluent limitations guidelines for existing sources and standards of performance and pretreatment standards for new sources within the corn wet milling, corn dry milling, normal wheat flour milling, bulgur wheat flour milling, normal rice milling, and parboiled rice processing subcategories of the grain mills category of point sources.

The purpose of this notice is to establish final effluent limitations guidelines for existing sources and standards of performance and pretreatment standards for new sources in the grain mills category of point sources by amending 40 CFR Chapter I, Subchapter N, to add a new Part 406. This final rulemaking is promulgated pursuant to sections 301, 304 (b) and (c), 306 (b) and (c) and 307 (c) of the Federal Water Pollution Control Act, as amended, (the Act); 33 U.S.C. 1251, 1311, 1314 (b) and (c), 1316 (b) and (c) and 1317 (c); 86 Stat. 816 et seq.; Pub. L. 92–500. Regulations regarding cooling water intake structures for

all categories of point sources under section 316(b) of the Act will be promulgated in 40 CFR Part 402.

* * *

The legal basis, methodology and factual conclusions which support promulgation of this regulation were set forth in substantial detail in the notice of public review procedures published August 6, 1973 (38 FR 21202), and in the notice of proposed rulemaking for the corn wet milling, corn dry milling, normal wheat flour milling, bulgur wheat flour milling, normal rice milling, and parboiled rice processing subcategories. In addition, the regulations as proposed were supported by two other documents: (1) The document entitled "Development Document for Proposed Effluent Limitations Guidelines and New Source Performance Standards for the Grain Processing Segment of the Grain Mills Point Source Category" (December 1973) and (2) the document entitled "Economic Analysis of Proposed Effluent Guidelines, Grain Milling Industry" (August, 1973). Both of these documents were made available to the public and circulated to interested persons at approximately the time of publication of the notice of proposed rulemaking.

* * *

(f) *Final rulemaking.* In consideration of the foregoing, 40 CFR Chapter I, subchapter N is hereby amended by adding a new Part 406, Grain Mills Point Source Category, to read as set forth below. This final regulation is promulgated as set forth below and shall be effective May 20, 1974.

Dated: March 12, 1974.

JOHN QUARLES,
Acting Administrator.

Subpart A—Corn Wet Milling Subcategory

Sec.

406.10 Applicability; description of the corn wet milling subcategory.

406.11 Specialized definitions.

406.12 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

406.13 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

406.14 [Reserved]

406.15 Standards of performance for new sources.

406.16 Pretreatment standards for new sources.

* * *

§ 406.15 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart:

Effluent characteristic	Effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days shall not exceed—
	Metric units (kilograms per 1,000 kg of corn)	
BOD5	1.08	0.36
TSS	.54	.18
pH	Within the range 6.0 to 9.0.	
	English units (pounds per 1,000 stdbu of corn)	
BOD5	60	20
TSS	30	10
pH	Within the range 6.0 to 9.0.	

* * *

APPENDIX D

The Administrator's "Decision Not To Revise New Sources Performance Standards" was published in the *Federal Register* at 40 Fed. Reg. 52016 (November 7, 1975). A portion of the text follows:

PART 406—GRAIN MILLS POINT SOURCE CATEGORY

Decision Not To Revise New Sources Performance Standards

On August 25, 1975, notice was published in the FEDERAL REGISTER (39 FR 10512), announcing the availability of documents relating to and to request comments on the tentative decision of the Environmental Protection Agency (EPA or Agency) not to revise standards of performance for new sources in the Corn Wet Milling subcategory of the Grain Mills Point Source Category.

The purpose of this further notice is to announce EPA's decision not to revise standards of performance for new sources in the Corn Wet Milling subcategory of the Grain Mills Point Source Category. On May 5, 1975, the U.S. Court of Appeals for the Eighth Circuit remanded to EPA the new source performance standards and the pretreatment standards for new sources for the Corn Wet Milling subcategory of the Grain Mills Point Source Category (40 CFR 406.15 and 406.16) promulgated by EPA under section 306 and 307 of the Federal Water Pollution Control Act Amendments of 1972. EPA has reviewed its new source performance standards for these point sources pursuant to the remand and has concluded that these standards should not be revised.

* * *

Interested persons were invited to participate in this evaluation by submitting written comments in triplicate. . . .

The EPA has considered carefully all of the comments received and a discussion of these comments with the Agency's response thereto follows.

(a) Summary of Comments. The following groups responded to the request for comments which was in the notice of availability of supplemental documents: Corn Products: CPC International, Inc., National Canners Association, Grain Processing Corporation, Anheuser-Busch, Inc., CPC International, Inc., and The Hubinger Company. Each of the comments received was carefully reviewed and analyzed. The following is a summary of the significant comments and EPA's response to these comments.

* * *

(3) A common comment was made that the concept of product mix as affecting waste load and technology was not properly considered in formulation of the new source performance standards.

EPA has acknowledged, and continues to acknowledge, that product mix variations may indeed have some influence on raw waste characteristics of corn wet milling wastes. However, no reliable and meaningful relationship between product mix and waste flow characteristics has been demonstrated to date either by EPA or industry. EPA's evaluation of industry-supplied data utilizing standard statistical approaches indicated no directly correlatable relationships between raw waste load and other individual factors such as plant age, plant size, product mix, etc.

Industry representatives have commented on several instances that new plants to be constructed will likely convert a large part of their grind into syrup, and this conclusion is amply verified by present trends within the industry. In any case, the new source performance standards would be equally as applicable irrespective of product emphasis. Waste load variation has been determined as not being attributable directly to any one factor or condition alone in a reliable and predictable manner. Obviously, any influence on waste load for this industry caused by various factors to any extent that it may exist is interrelated in a very complex and presently undefinable manner.

The industry has yet to provide data or information to responsibly disprove the considered conclusions of EPA.

More importantly, evidence supports that any variations in product mix as affecting raw waste load do not preclude compliance of existing or new sources with present effluent guidelines and new source performance standards. Manufacturing processes employed in the corn wet milling industry are not separate and unique from other processes employed within the food processing industry as a whole. Neither is the inherent waste contribution variability and any treatment difficulties experienced with the corn wet milling industry a unique experience as compared to other industries. Many other related industries (as cited in the Supplemental Development Document) that produce a variety of different products have demonstrated the capability to successfully employ biological treatment and other treatment methods to accomplish high levels of pollutant reduction.

* * *

(6) Several commenters indicate confusion as to the interpretation and intent of EPA's effluent variability analysis of historical treatment data contained in the Supplemental Development Document and supportive record in relation to its application to the new source performance standard.

Effluent variability as reflected in the new source performance standards are based solely on treatment technology and variations anticipated for a well-designed, well-operated treatment system as experienced within operating biological treatment systems on an overall multi-industry basis. EPA has never asserted that statistically derived variability factors are a desirable or even appropriate means for determining effluent guidelines and new source performance standards for the corn wet milling industry. Factors were calculated and are presented in the Supplemental Development Document only as an illustration that the new source performance standard is reasonable and attainable in relation to existing overall industry practice. There obviously is no statistical data available with respect to treatment systems for new sources. In this respect, variability data for existing sources would not be entirely

representative of and comparable with effluent variability to be expected for new sources inasmuch as no present corn wet milling plant is now completely "exemplary" in terms of the established new source performance standard. Upsets in most instances at existing plants (e.g. Clinton Corn) may be attributed to specific events or occurrences of poor operation (e.g. spills) rather than product variability changes or other production-related factors. It should be emphasized that no existing plants incorporate full in-plant controls or equalization that materially affect raw waste load variability and sustained biological treatment performance.

* * *

(c) Basis for decision not to revise new source performance standard. On the basis of the original and additional investigative work performed, EPA finds no justification for revision of the New Source Performance Standard for the Corn Wet Milling Subcategory of the Grain Mills Category on either technological or economic grounds. Therefore, EPA has determined not to revise the standard, and therefore, the New Source Performance Standard as promulgated by the Agency for the Grain Mills Point Source Category on March 20, 1974 (39 FR 10512) shall remain applicable.

Dated: October 30, 1975.

RUSSELL E. TRAIN,
Administrator.

APPENDIX E

The Agency's recent amendment to its new source standards for the corn wet milling industry is found at 41 Fed. Reg. 50823 (November 18, 1976). The text of the amendment and of the attendant rulemaking order is as follows:

PART 406—GRAIN MILLS POINT SOURCE CATEGORY

Subpart A—Corn Wet Milling Subcategory

NEW SOURCE PERFORMANCE STANDARDS

Notice is hereby given that the Environmental Protection Agency (EPA) is amending 40 CFR 406.15, the new source performance standards for the corn wet milling subcategory (Subpart A) of the Grain Mills Point Source Category, 40 CFR Part 406.

40 CFR Part 406 was promulgated on March 20, 1974, (39 FR 10515) pursuant to section 306(b) of the Federal Water Pollution Control Act as amended, 33 U.S.C. 1316(b), 86 Stat. 816 et seq., Pub. L. 92-500.

The change being made is to the limitation of the discharge of total suspended solids (TSS) found in § 406.15.

This amendment of the new source standards follows the decision issued by the Court of Appeals for the Eighth Circuit on August 18, 1976, in the case of *CPC International Inc., et al.* v. *Russell E. Train, et al.*, No. 74-1448. In the opinion, the Eighth Circuit affirmed EPA's new source performance standards in all respects save one. The Court, after reviewing available operating data from the biological and multimedia filter system at the Clinton Corn Processing Company in Clinton, Iowa, among other sources of information, determined that although BOD_5 could be removed to the 20 pounds per day level set by EPA, total suspended solids (TSS) could not be removed to attain a more stringent level of 10 pounds per day. The Court made its own assessment of the data and determined that

the appropriate limit should be 25 pounds per day of total suspended solids on a monthly average. That assessment is set forth below:

> On remand therefore, the EPA may adopt a new source standard of a maximum average of daily effluent levels for thirty consecutive days of 20 pounds of BOD_5 and 25 pounds of TSS per MSBu and a maximum daily effluent level of 60 pounds of BOD_5 and 75 pounds of TSS per MSBu. We urge it to do so.
>
> We remand to the EPA with directions to it to revise the TSS standard to 25 pounds per MSBu or to compile additional evidence to support a lower standard. If the EPA decides to present a lower TSS standard we retain jurisdiction and direct the administrative process be completed in sixty days.

The issue of the appropriate suspended solids standards has been subjected to protracted controversy and litigation. Rather than gather additional evidence which might support a more stringent standard than the 25 pounds standard and thereby protract the rulemaking even more, the Agency has determined that the 25 pounds supported by the present record is an appropriate standard. It is therefore in the public interest to proceed with this alternative indicated in the 8th Circuit Court's opinion.

In view of the sixty day period for action set by the Court and in view of the fact that no additional data are being assessed as the basis for this amendment, the Agency is dispensing with a notice of proposed rulemaking prior to this amendment.

In accordance with the above opinion, the new source standards for the corn wet milling subcategory of the grain mills point source category (40 CFR 406.15) (Subpart A), are amended as set forth below and are effective on November 18, 1976.

Dated: November 12, 1976.

JOHN QUARLES,
Acting Administrator.

40 CFR Part 406 is amended by revising Subpart A, § 406.15 to read as follows:

§ 406.15 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart:

Effluent characteristic	Effluent limitations (Metric units—kilograms per 1,000 kg of corn)	
	Maximum for any 1 day	Average of daily values for 30 consecutive days shall not exceed
BOD_5	1.08	0.36
TSS	1.35	.45
pH	(1)	(1)
	(English units—pounds per 1,000 stdbu of corn)	
BOD_5	60	20
TSS	75	25
pH	(1)	(1)

[1] Within the range of 6.0 to 9.0.

No. 76-981

Supreme Court, U. S.
FILED
APR 4 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

CPC INTERNATIONAL INC., ET AL., PETITIONERS

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

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CPC INTERNATIONAL INC., ET AL., PETITIONERS

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1. This case involves standards of performance for controlling the discharge of pollutants by new sources under Section 306 of the Federal Water Pollution Control Act Amendments of 1972 ("the Act"), 86 Stat. 854, 33 U.S.C. (Supp. V) 1316. Petitioners challenge the new source standards promulgated by the Environmental Protection Agency ("EPA" or "the agency") for the corn wet milling industry, one of the six subcategories recognized by EPA's regulations establishing effluent limitations for the grain processing point source category (Pet. App. 1c).

The court of appeals initially held that the particular new source standards involved were not supported by sufficient evidence in the record (*CPC International Inc.* v. *Train*, 515 F. 2d 1032 (C.A. 8)) ("*CPC I*") and remanded for further

proceedings. EPA conducted further proceedings which resulted in readoption of the original standards. In the decision challenged here, the court of appeals affirmed these standards except with respect to the limitation level for total suspended solids. As to that pollutant, the court ruled that the agency should either adopt a level the court held to be supported by the present record, or reopen the record to develop evidence supporting a lower level (Pet. App. A). The agency adopted the level suggested by the court (Pet. App. D).

2. The principal issue tendered by petitioners—whether new source standards must provide a variance procedure—has been resolved by this Court's decision in *E.I. duPont de Nemours & Co.* v. *Train*, No. 75-978, decided Feburary 23, 1977. The Court there held that Section 306 does not require variances for individual plants unable to comply with the new source standards.

Petitioners nevertheless contend that the case should be remanded to the court of appeals for reconsideration of this issue because they perceive a conflict between the court of appeals' supposed reliance on permits with terms to remedy the problem of "excursions"[1] and the subsequent holding in the *duPont* cases that no variance provision for new source standards is required (Pet. 10).

The conclusion of the court of appeals that the agency had acted properly in not providing for excursions in these new source standards, however, was actually based

[1]"Excursions" are outputs of pollutants that on several days of the year exceed the predictable performance that accounts for 99 percent of the maximum otherwise expected during a plant's operating year (Pet. App. 13a-14a).

on an examination of the particular administrative record in this case, which revealed that as a factual matter excursions for new plants in this industry may be avoided by applying available waste treatment technology (Pet. App. 14a).[2] There is no reason why the court of appeals should reconsider its reasoning on this point in light of the *duPont* decision.

3. Whether EPA should make provision for excursions in new source standards under Section 306 depends upon the technological circumstances found in each particular industry or subcategory of point sources. In the instant case the court of appeals did not purport to establish a uniform rule that excursions need not be provided in new source standards. Rather, the court carefully limited its consideration to the particular administrative record before it and correctly concluded that in this particular case the Administrator had not acted arbitrarily or capriciously in his consideration of variability or excursions

[2]The court also indicated that, even if on a rare occasion the standards are exceeded due to "inadvertent error or Act of God," the agency has established a policy of informally working with the plant involved "to remedy the problem" rather than bringing an immediate enforcement action (Pet. App. 14a-15a). The court additionally noted that the agency had established a policy of revising a permit for a new source if the permit conditions "prove to be unreasonable or cannot be met for cause beyond the control of the permittee" (Pet. App. 15a). Contrary to the petitioners' implication, this latter reference to permit conditions was clearly not the sole or primary basis of the court's holding on this point. In any event, we believe there is no inconsistency at all between a flexible policy of revising permit conditions under certain circumstances and the holding in the *duPont* cases that a variance provision is not *required* under Section 306 of the Act.

(Pet. App. 13a-15a).[3] Similarly, in *American Petroleum Institute* v. *Environmental Protection Agency*, 540 F. 2d 1023 (C.A. 10), relied on by the petitioners (Pet. 12), the court of appeals made it clear that the question of excursions turns on the particular administrative record in each case (540 F. 2d at 1036):

> The Fourth Circuit [in *FMC Corp.* v. *Train*, 539 F. 2d 973] was considering a factual situation different from that before us. On the present record we are unconvinced that the refineries should be granted any specific number of days during a year when they may make excess discharges.

Since the question whether an allowance for excursions should be contained in new source standards must be decided on a category-by-category basis, there is, in fact, no conflict among the courts of appeals.

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[3]Since no existing corn wet milling plant is performing adequately in terms of the expected performance of a *new* plant, an accurate variability factor for new plants cannot be statistically calculated. Such a factor represents the relationship between the average short-term and the average long-term performance of a treatment system, and takes into account expected fluctuations. *CPC I, supra*, 515 F. 2d at 1046-1047, n. 30. Thus, since an allowable number of excursions must be derived from such a statistically calculated variability factor, at the present time it would not even be possible to determine a meaningful number of allowable excursions for new plants in this particular industry.

As the Administrator explained in his "Decision Not to Revise New Sources Performance Standards" (Pet. App. 3d-4d):

> There obviously is no statistical data available with respect to treatment systems for new sources. In this respect, variability data for existing sources would not be entirely representative of and comparable with effluent variability to be expected for new sources inasmuch as no present corn wet milling plant is now completely "exemplary" in terms of the established new source performance standard.

4. Petitioners' final contention is that the court of appeals erred in finding that the Administrator had properly considered the effects of varying product mix[4] in establishing the new source standards for the corn wet milling subcategory (Pet. 13-14).

First, the Administrator took into account the various processes employed in the grain mills category of point sources by dividing the category into six distinct subcategories, one of which was corn wet milling (Pet. App. 1c). With regard to the corn wet milling subcategory itself, the Administrator found (Pet. App. 2d-3d):

> EPA has acknowledged, and continues to acknowledge, that product mix variations may indeed have some influence on raw waste characteristics of corn wet milling wastes. However, no reliable and meaningful relationship between product mix and waste flow characteristics has been demonstrated to date either by EPA or industry. * * *
>
> * * * * *
>
> The industry has yet to provide data or information to responsibly disprove the considered conclusions of EPA. More importantly, evidence supports [sic] that any variations in product mix as affecting raw waste load do not preclude compliance of existing or new sources with present effluent guidelines and new source performance standards. * * *

After carefully examining the voluminous administrative record, the court of appeals correctly determined that the

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[4]The term "product mix" refers to the fact that corn wet milling plants typically process raw corn into such different products as corn syrups, corn sweeteners, and modified starches in varying amounts.

Administrator's conclusions as to the product mix effects in the corn wet milling subcategory were not arbitrary or capricious. There is no reason for this Court to re-examine this determination.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.

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[5]Petitioners contend that a plant manufacturing modified starches should not be subjected to the requirements of a plant manufacturing syrup or sweeteners. But the court of appeals found (Pet. App. 12a) that—

> [t]he record also discloses that the EPA did take into consideration the increased wasteloads generated by the production of modified starches. The EPA compiled data of actual performance results from newer existing mills that produce both conventional corn syrups and modified starches and also the projections for new plants, submitted by the industry, in order to determine the wastewater flow and influent levels of the model plant. * * *
>
> Furthermore, the data relied upon by the petitioners * * * must be contrasted with other data showing no appreciable influent increase.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

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CPC INTERNATIONAL INC., ET AL.,

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v.

DOUGLAS M. COSTLE, as Administrator,
Environmental Protection Agency, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY OF PETITIONERS

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REPLY OF PETITIONERS

The central issue in this petition was not resolved by this Court's decision in *E. I. du Pont de Nemours & Co.* v. *Train*, 45 U.S.L.W. 4212 (Nos. 75-978, etc., decided February 23, 1977). The issue is whether in new source standards for corn wet mills "EPA should provide an *excursion* provision that will offset the expected . . . violations." *FMC Corp.* v. *Train*, 539 F.2d 973, 986 (4th Cir. 1976) (emphasis added). The *du Pont* decision, however, makes the question of "excursions" one of considerable significance, because the Court held that the standards are "absolute prohibitions."

The thrust of EPA's position is that the Agency could decide to rely upon enforcement discretion or upon "a flexible policy of revising permit conditions under certain

circumstances" to account adequately for the inevitable occasions upon which the Agency's new source standards will be exceeded. (EPA's Memorandum, at 3.)[1] These occasions would arise because of the statistical method used by the Agency to derive the standards, and would occur at well-run plants without the fault of the plant operator.

Given the "absolute" nature of EPA's new source standards,[2] petitioners submit that EPA's response is not sufficient. Operators of new corn wet mills should not be forced to conduct their operations at the sufferance of the Administrator of EPA, being subject always to a benevolent Administrator's willingness to pardon certain "violations". Future Administrators may be less willing to accept the inevitability of certain violations. A plant's potential exposure in an enforcement action is large; the Act authorizes the imposition of awesome penalties. See §§ 309 and 505.

This case should be remanded for the court of appeals to reconsider the matter in light of the *du Pont* decision. As the Fourth Circuit said in its *FMC* opinion, "[p]lant owners should not be subject to sanctions when they are operating a proper treatment facility." *FMC Corp.* v. *Train*, 539 F.2d 973, 986 (4th Cir. 1976). See also *Essex Chemical Corp.* v. *Ruckelshaus*, 158 U.S. App. D.C. 360, 486 F.2d 427, 432-433 (1973), *cert. denied sub nom. Appalachian Power Co.* v. *Environmental Protection Agency*, 416 U.S. 969

[1] EPA also relies upon the assertion that new corn wet mills may avoid excursions "by applying available waste treatment technology." (EPA's Memorandum, at 3.) To some measure, the court of appeals accepted EPA's assertion that "many steps," left unidentified, were available to reduce effluent variability and thus excursions. (See 540 F.2d at 1337; Appendix A to Petition, at 14a.) EPA did not include any of these unidentified steps in "the best available demonstrated control technology" (§ 306(a)(1)) which it described for corn wet mills and upon which it relied, as it had to under the statute, to set the new source standards at issue here. Accordingly, the unspecified further steps deserve to be accorded no weight, and the court of appeals logically continued with its analysis on the basis that a certain number of occasions would arise where the EPA standards were exceeded in the absence of any fault by the plant operator. (540 F.2d at 1338; Appendix A to Petition, at 14a-15a.)

[2] *E. I. du Pont de Nemours & Co.* v. *Train*, 45 U.S.L.W. 4212, 4219 (Nos. 75-978, etc., decided February 23, 1977).

(1974) (air emission standards under the Clean Air Act for new sources).

Respectfully submitted,

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APRIL 14, 1977